SUPREME COURT, U.S.

No. 743

In the

Supreme Court of the United States

OCTOBER TERM, 1961

Office Supreme Court, U.S.
FILED
FEB 1961
JOHN F. DAVIS, CLERK

PETE BLACK,
Petitioner,

v.

SINCLAIR OIL & GAS COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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SINCLAIR OIL & GAS COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Pete Black prays that a writ of certiorari issue to review the action and the judgment of the United States Court of Appeals for the Fifth Circuit, entered January 26, 1962. Petition for Rehearing was denied December 29, 1961.

1.

OPINIONS OF THE COURT BELOW

The opinion of the Court of Appeals printed in Appendix A hereto has not yet been reported.

2.

JURISDICTION

The judgment of the Court of Appeals was entered Jan. 26, 1962. Rehearing was denied on December 29, 1961. The jurisdiction of this Court is invoked under Article 28 U. S. C., Sec. 1254(1).

3.

QUESTIONS PRESENTED

I.

Whether a Court of Civil Appeals may, in rendering its judgment in a diversity case, apply substantive law which is in direct conflict with the law of the State from which the case was appealed as declared by the Supreme Court of the state?

II.

Whether a Circuit Court of Appeals may affirm the judgment of the trial Court rendering a summary judgment in a case where the evidence raised issues of fact for the jury without denying to petitioner a trial by jury as required by the Seventh Amendment to the Constitution of the United States?

4.

STATEMENT

The opinion of the Fifth Circuit ignored altogether the fact that Sinclair Oil & Gas Company not only connected up the riser which came loose, causing gas and oil to be present

in sufficient quantities to gas plaintiff and render the top of the tank slippery, but the Fifth Circuit also ignored the fact that Sinclair Oil & Gas Company furnished the defective tank with sloping top and no circular rails as well as making it necessary for plaintiff to be on top of the tank in order to gauge same, all of which constituted negligence or, at least the jury could have found was negligence and a proximate cause of the injuries sustained by petitioner.

Petitioner was injured on or about December 29, 1955, while working as an employee of Lee Brown Drilling Company as a driller. Appellant was engaged in swabbing an oil well and the well was being swabbed over the top and down into the tank. At about 5:45 a. m., the appellant, Pete Black, was faced with an emergency in that the riser on the test tank came up and appellant had to immediately put the riser down or otherwise oil would have sprayed all over the rig floor and endangered the safety of appellant and his co-workers. Petitioner further alleges that after he had gone to the top of the tank to put the riser down, that suddenly and without warning, and due to the negligence of the defendant corporation, petitioner fell from the top of such tank a distance of approximately 16 feet, striking his head upon a valve and the side of the tank, resulting in appellant's serious and permanent injury.

Petitioner alleged that the respondent was guilty of negligence in a number of particulars:

(a) In that they failed to provide plaintiff with a safe place in which to work;

(b) In that they failed to warn plaintiff that they had not provided him with a safe place in which to work;

(c) In that they failed to inspect the premises where the accident occurred to determine that such premises afforded plaintiff a safe place in which to work;

(d) In that they failed to provide adequate lighting on top of the tank where it was necessary for plaintiff to work;

(e) In that they failed to provide guard rails on top of the tank where plaintiff was working;

(f) In that defendant was having the well swabbed over the top and down into the tank;

(g) In that defendant failed to have the well swabbed into the side of the tank;

(h) In that the defendant failed to provide means to prevent the oil from spreading over the top of the tank.

Petitioner would further show the Court that the safer and customary practice in the oil field in swabbing an oil well is to swab the well into the side of the tank and not over the top and down into the tank as was being done at the time appellant sustained his injuries; that the defendant corporation, acting through its agents, servants and employees, in its exercise of over-all supervision of the work being done, had ordered and directed that the well be swabbed over the top and down into the tank, in violation of the safe and customary practice of swabbing the well into

the side of the tank. Appellant would further show that it is customary to provide adequate lighting facilities around the top of such test tanks, and that it was the duty of the respondent to provide such lighting and such guard rails which were not provided upon the occasion in question.

During the course of the trial, petitioner put on much evidence without dispute showing *that the tank was furnished by the respondent, Sinclair Oil & Gas Company.*

The witness, Rainey Johnson, testified, in part, that it is customary for a company who furnishes the test tanks, as appellee Sinclair did in this case, to equip the said test tanks with platforms or circular guard rails that will enable a man to gauge them without going on the top of them from the side of them (R. 24); that this particular tank had no guard rail from which the tank could be gauged from the side (R. 24); that the type of pipe used in furnishing the riser was two-inch standard pipe (R. 24) and that the first that he knew that Mr. Black had been injured was when he found him unconscious at the foot of the tank with blood all over his face and head (R. 25). He further testified that following the accident that he went up on top of the tank and smelled gas; that it was pretty strong and had quite an odor (R. 26); and further, that he noticed that oil was sprayed all over the top of the tank (R. 26); that it was very slippery on top of the tank (R. 27). He further testified that whenever a riser comes loose from the top of one of the test tanks that it presents a dangerous situation; that when that happens, that oil and gas is liberated into the air

and that unless it is immediately stopped, that it can burn up the whole works right fast (R. 27).

The witness, Raymond Knox, testified that he resided in Odessa, Texas; that he had twenty-five years of experience in the oil fields, for many years being a production foreman in the West Texas area for Gulf Oil Corporation and a drilling superintendent for Gulf Oil Corporation, and that he had worked in practically all the counties in the Permian Basin (R. 57). Mr. Knox further testified that during his many years of experience in the oil fields, that he had known many men to be injured or killed from being gassed while gauging tanks located in hydrogen sulphide gaseous areas; that when a company such as Sinclair is drilling an oil well that it is customary for the well owner, such as Sinclair in this case, to furnish the test tank, and that it is also customary for one such as Sinclair to hook the tank up when they furnish the tank (R. 58). He further testified that it was customary that these tanks have platforms or circular stairways or guard rails that render it unnecessary for a man to go up on top of the tank in order to gauge a tank; that practically all of them are equipped like this (R. 59).

He further testified that it didn't take very much pressure to cause a riser to come loose (R. 61), and that it is customary for the one who furnishes the test tank, such as Sinclair, in this case, to see that the riser is tied down (R. 61). He further testified that there is not one man out of a thousand in the oil field that knows that gas as long as you can smell it won't hurt you, but that when it is really dan-

gerous it paralyzes the respiratory senses and that is when it kills you and knocks you out (R. 68):

The witness, Horace Bell, testified that the test tank furnished by appellee, Sinclair, was not equipped with a guard rail; that he had never noticed any oil on top of the tank before appellant, Black, fell from same (R. 73); that the odor of sour gas was much more prevalent after Black fell from the tank than before (R. 74). He further testified that it was customary to tie down the riser with a chain and that a company such as Sinclair should do so (R. 74), but that this one was not so tied down. He further testified to the dangerous situation rendering it necessary for the riser to be tied down in order to save human lives and property in the event it comes loose (R. 75).

Petitioner, Black, testified that he did not believe that there was any danger of his being gassed or falling off the tank (R. 90-91), but that he knew that the tank was unsafe before the accident but that the thing that caused him to go up there on the occasion of the accident was to get the riser back in the tank so that oil wouldn't spray all over everything (R. 91). He further testified that if there had been a spark from one of the motors, it could have burned the whole rig down and possibly the whole crew (R. 92). Petitioner, Black, further testified that he was acting on the spur of the moment and that when he saw the riser coming loose, the only thing that he thought about was getting that riser back in there and getting it back in the tank quickly so that if a spark should have hit it, it wouldn't have burned the whole thing up (R. 92). He further testified that he

never knew of a case where the drilling crew had anything to do with the hooking up of a test tank (R. 93). Petitioner Black further testified that he did not know that gas, when it was present in sufficient concentration to knock you unconscious, would paralyze your sense of smell and that he did not realize that there was any danger of him being gassed from being on top of the tank (R. 94). Petitioner Black further testified that nobody had ever warned him that it was dangerous and that he had never been told that hydrogen sulphide gas was poisonous and deadly and that a very small percentage of it in the air is sufficient to kill you and that if he had been so warned, he would not have been on top of the tank (R. 94). He further testified that had there been a guard rail upon the occasion in question that he would have held onto the rail and that it would have prevented him from falling. He said that he fell when he was gauging the tank and that the guard rail would have kept him from falling off the tank. He testified that he did not know whether he was gassed or what caused him to fall (R. 101-102).

It is quite obvious from the above evidence that the appellee Sinclair failed to discharge its duty of exercising ordinary and reasonable care to furnish the appellant with a reasonably safe place in that *they furnished him a defective tank* that required him to go up on top of the tank in order to gauge same. *The evidence also raised the issue that it was Sinclair's duty to chain down the riser.* It will be further noted that appellart did not slip while putting down the riser, but slipped while gauging the tank at a time when

the jury concluded that he could have been gassed and appellant was gassed or at least the jury could have concluded that he was gassed from the fact the odor of gas was *so much stronger after the accident than it was before and from other evidence showing that when the oil and gas sprayed out by the riser coming loose*; that gas would be present in the air in great quantities, and it is apparent from the evidence that appellee Sinclair was guilty of negligence in failing to warn appellant Black of the dangerous nature of the hydrogen sulphide gas and the fact that the place that he had been furnished to work was unsafe. This was undoubtedly the proximate cause of Black's injury since he testified that he would not have gone upon the tank had he been so warned. It is difficult to see how, under the facts and circumstances of the case, the trial court could have rendered a summary judgment against this petitioner. The trial court first submitted this case to a jury and after a mistrial due to their inability to agree rendered summary judgment.

It is further quite elementary that contributory negligence to bar petitioner's recovery must have been a proximate cause of his injury and it is just as elementary that one who attempts to rescue others, *even though not asked to rescue them*, cannot be held to be guilty of contributory negligence. It is the duty of This Honorable Court to indulge in all evidence favorable to the appellant and to disregard all evidence unfavorable to appellant's theory of the case in passing upon the question of whether the trial court's summary judgment should be affirmed. Under the evidence

most favorable to the appellant, he, of course, did not recognize that the steps were slippery until after the riser had blown loose and sprayed oil upon them and he had never been warned by Johnson or anyone else to that effect.

However, if Black went up there as he claims he did and as the evidence strongly indicates that he did, because the riser was blowing and represented an immediate threat of endangering the lives of all of his co-workers, then he would be excused from negligence, even though he knew that the situation was a dangerous one, under well settled Texas law.

In addition to this, if the cause of petitioner's accident was not slipping due to oil, but was due to having been gassed, then contributory negligence, if any, in connection with knowledge, if any, of the danger of slipping on oil could not be the proximate cause of Black's injuries and hence, could not bar a recovery.

It is deemed unnecessary to submit any authorities to the effect that contributory negligence, in order to bar recovery, must be a proximate cause of the injury. What we have said here distinguishes this case from all the other cases which were cited by the Fifth Circuit and clearly makes this a fact matter for the jury that should require no further citation of authority. However, I would like to briefly point out that *Gulf Oil Corporation v. Sword* and *Hurst* are not in point, first, because it did not *involve a situation containing hydrogen sulphide gas* and, second, because the company, in the *Sword* and *Hurst* cases, *did not furnish the defective machinery* that caused this man's

injury or the dangerous and defective premises that brought it about whether we assume that *he either slipped or was gassed.* This distinction is important and is brought out in *Sword v. Gulf Oil Corporation, 251 Fed. 2d 829.* On Page 835, Syllabi (3), Judge Rives, who wrote the opinion in each decision, said:

> "This opinion would be extended unreasonably, and no useful purpose would be served, by a discussion of the many Texas decisions, or of those from this Court, relied on by the respective parties. It is sufficient to note that none of them goes so far as to hold, or to support a holding, that an employer of an independent contractor owes a duty to the contractor's employees to inspect the machinery furnished by the contractor, in the absence of any actual control of the operation, or of any reserved right of control more than that deemed necessary to secure the satisfactory completion of the work."

In this case it is undisputed that Sinclair furnished the test tank involved. It is shown by the evidence *that they either hooked it up or, as a matter of custom, should have hooked it up,* and it is clearly shown by the evidence that *when they furnished the test tank* that they should have furnished one with guard rails as a part of the equipment. This was the testimony of Johnson, Knox, Bell and Black. In this connection, the Court is familiar with the many cases holding that evidence of custom is not conclusive in establishing negligence and that even a custom may be a negligent one, but evidence of custom raises a fact issue for the jury.

It is for the jury to say whether or not furnishing a test tank without circular guard rails to protect men who are

called up there to gauge same under conditions where they are slippery and will get slippery in the presence of the best of care as testified to by Mr. Black, and where men are liable to be gassed from this dangerous hydrogen sulphide gas in being required to get their face over the hatch in order to gauge the tank and in being required to go upon the top of the tank to do so, presents a question of fact for the jury.

It is quite evident that, under the contract here involved, that Sinclair reserved actual right of control to determine how the swabbing operation should be done and carried on.

The Fifth Circuit has apparently recognized heretofore that *this is the type of case* that should be submitted to the jury as was held in both the *Wright* and *Gibson* cases.

5.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

1. The Constitutional provision involved in this case is the Seventh Amendment to the Constitution of the United States reading as follows:

> "In suits at common law, where the value in controversy shall exceed $20.00, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

2. The statutory provision involved in this case is the *Rules of Decision Act, 28 U. S. C., Sec. 1652* which reads as follows:

> "The laws of the several states, except where the Constitution or treaties of the United States or acts of

Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the Courts of the United States, in cases where they apply."

6.

REASONS FOR GRANTING THE WRIT

1. The decision of the Court of Appeals is not in accord with the applicable decisions of the Supreme Court of Texas.

The holdings complained of under the preceding statement are in direct conflict with the Supreme Court of Texas decisions on this subject hereinabove and hereinafter set out, particularly the case of *Roosth & Gonzoir Production Co. v. White*, *262 S. W. 2d 99*, wherein the Supreme Court of Texas held that one who furnished a defective derrick was liable under the Restatement of the Law of Torts, Section 392, Comment E, Illustration 1, stating (1) the fact that an identical duty exists on the part of the independent contractor as master of the servant in this does not, however, relieve from liability the original supplier of the chattel who, by his failure to inspect it, has permitted it to go out of his hands in a dangerous condition.

The rule announced earlier in our Texas Courts in *Texas Oil Company v. Church*, *74 S. W. 2d 797*, which the Circuit Court apparently followed, was expressly overruled by the Supreme Court of Texas, hence the Court of Civil Appeals did not follow the law of Texas and a typical situation is

presented in which This Honorable Court has, on a number of cases, granted writs of certiorari.

Erie R. Co. v. Tompkins, 304 U. S. 64;

Russell v. Todd, 309 U. S. 280;

Wichita Royalty Co. v. City National Bank, 306 U. S. 103;

Guaranty Trust Co. v. York, 320 U. S. 99.

See also Rules of Decision Act, U. S. C., Section 1652.

Certiorari was also apparently granted by this Honorable Court for this reason in *Phillips Petroleum Co. v. Gibson, 232 Fed. 2d 13, 1 L. Ed. 2d 77.*

The cases cited by the Fifth Circuit are not in point with the facts in the case at bar.

(1) The Court's opinion in this case is, we respectfully submit, clearly erroneous. In the case of *E. G. Cook, et al. v. Phillips Petroleum Co., 158 Fed. 2d 11,* the independent contractor furnished the ladder upon which the decedent climbed. In this case, this equipment was furnished by Sinclair Oil & Gas Company.

(2) The opinion states that E. L. Farmer & Company had gas masks ready and available for their men which is not true in this case. In other words, in the *Cook* case, Farmer undertook to furnish not only the ladder upon which Cook was to climb, but also undertook to furnish gas masks. In the *Cook* case the question of who had superior knowledge of the danger, which is the final test announced in the *Wright* case and all others, could not be developed.

(3) Cook was dead and we could not develop the proof that was developed in this case, to-wit, that gas, when it is present sufficient to render a man unconscious, cannot be smelled. In the *Sword* and *Hurst cases*, the machinery was furnished by the one occupying the position of Sinclair in this case and those cases simply hold that there was no obligation upon the part of the independent contractor to inspect the machinery *furnished by the contractor.*

(4) *Gulf Oil Company v. Birens, 276 Fed. 2d 753*, cited by This Honorable Court, is not in point since that case went off upon the proposition that *warning had been given to the independent contractor.* (2 to 1) Decision.

(5) *McKee v. Patterson, S. Ct. Texas, 1941, 271 S. W. 2d 391*, is not in point because that case went off upon the proposition of open and obvious danger.

(6) This Court has said:

> "But there was no proof that Black was subjected to any gas or that he was asphyxiated or otherwise debilitated by the presence of gas, if there was any gas present at the time he fell. In fact, he testified in detail to the events attending his fall. Additionally, it is worthy of note that the careful enumeration in his complaint of the facts he relied upon as establishing Sinclair's negligence did not mention gas."

This portion of this Opinion, we respectfully submit, is clearly erroneous.

(7) In all of the cases relied upon by the Fifth Circuit Court, the rescue doctrine was not in the cases, whereas here the fact that Black was acting in an emergency to prevent

sudden death and disaster is not even disputed. This important facet of this case is missed by this eminent Court of known and able legal scholars without explanation. All of these important facts have been overlooked by the Circuit Court and in none of the cases cited were these facts considered. It appears that a new opinion should be required.

The Court below *refuses to consider* these vital distinctions upon the proposition laid down by Judge Hutcheson from which Judge Cameron quotes in a footnote that the employee had been fully compensated. We would like to point out that under Texas law that at the time of this accident that a lump sum of approximately $10,000.00 was all that a man could receive for total and permanent disability in a compensation case and one can hardly contend that one injured as seriously as Black was would be fully compensated by this amount. The compensation laws of Texas and other states were passed because so many people were unable to prove negligence and it was decided by the law makers of various states, including Texas, that to give everybody a small amount would be better than requiring them to prove negligence of the employer and hence, they provided that where compensation was carried common law negligence was waived as to the employer only.

It has never been the intention of any court that third party causes of action should be destroyed due to such fact, unless it was the intention of Judge Hutcheson in the *Wright* case wherein he wrote what was labeled *as a concurring opinion but in truth and fact was a dissenting opinion.*

The mere quotation of this paragraph would show a tendency on the part of the Fifth Circuit Court to overrule hundreds of cases throughout America giving rise to third party liability and to deny a trial by jury to this appellant.

There was proof of the presence of gas. The record showed that the riser in the tank caused oil which was in a storage tank to spray out on top of the tank and that Black had to go up there immediately to prevent a fire. (R. Pgs. 91-92.) It further shows that Black had never been told that gas, when it was in sufficient concentration to knock him unconscious, would paralyze his sense of smell. (R. Pg. 94.) We think it a matter of common knowledge of which this Court should take judicial notice that oil coming from petroleum storage tanks has hydrogen sulphide gas in same, which, when it is released in sufficient concentration, is inherently dangerous and it was for the jury to say what proximately caused Black's accident.

We cannot take pictures of the gas or show it to the Fifth Circuit Court or get an analysis of it after an accident such as this. Black testified that he had detected a slight odor of gas prior to falling but that it wasn't as strong as it was after he fell. (R. Pg. 50.) This clearly gives rise to the proposition that hydrogen sulphide gas was present. Many, many cases hold that evidence of this type would be sufficient to raise this point for the determination of the jury.

We likewise respectfully submit that *if* the pleadings are insufficient, that the interest of justice requires that this cause be reversed and remanded so that Petitioners may allege a failure specifically to warn him that gas in sufficient

concentration to render him unconscious could not be smelled and that as to this cause Black could not rely upon his sense of smell but should have a gas mask.

We further think that this evidence was admissible under the general allegation that the defendant, Sinclair, had failed to warn him that they had not furnished him a safe place in which to work. This clearly would be one of the things that would render the place unsafe in which to work. Great liberality in pleading in the absence of exception under Federal rules is allowed and the Fifth Circuit Court's narrow construction of the pleadings in this case is manifestly wrong under well settled law of Texas, of this Court and other Federal Courts.

In this connection, we call the Supreme Court's attention to the case of *Skelly Oil Company v. Amacker, 132 Fed. 2d 431*, wherein the Fifth Circuit Court held that where an issue had been tried by consent, an amendment could be filed thirty days after judgment authorizing the pleading.

We, of course, do not think it necessary to rely upon this since we think beyond cavil that the general allegation made is sufficient to permit proof concerning the gas, failure to warn, etc.

For instance, *Arnold v. Panhandle & Santa Fe Ry. Co., 353 U. S. 360, 1 L. Ed. 2d 889, 1957*, this Court held that even though the jury had found, in answer to a great number of inquiries as to specific negligence, that the place was not unsafe; that there was still other evidence that the jury could consider that would render the place unsafe and reversed the

judgment of the Supreme Court of Texas and affirmed the judgment for the plaintiff in this F.E.L.A. action.

The matters herein pointed out are fundamental and elementary and the action of This Honorable Court serves to destroy third party actions and to destroy the trial by jury to which this Appellant is entitled under our Federal Constitution.

This Honorable Court has zealously, in the last few years, by numerous decisions, protected the right of trial by jury in a case such as this.

The Fifth Circuit Court has attached importance to the fact that the plaintiff said that the guard rail might not have kept him from falling. If this were true, it would be only a conclusion of the plaintiff because he fell when he was guaging the tank. This would indicate that the plaintiff *had been gassed*. The guard rail was important because had the guard rail been present it would not have been necessary for Black to have placed his face down over the hatch from which the gas was escaping in order to gauge the tank.

It is generally a question for the jury under all the evidence as to what the proximate cause of the Appellant's injury was and this includes these findings as to how it occurred.

The Circuit Court in the course of the opinion by the eminent Jurist Cameron states in substance that the tank top appears proper and level to that Court. There was much expert testimony on this tank being unsafe and defective and This Honorable Court knows that it is not the function of the Circuit Court whose qualifications as to the safety of oil field

test tanks is at least questionable, to determine *this factual issue and take it away from the jury.*

If the Fifth Circuit Court knew more than anyone concerning the safety of the tops of oil field test tanks it would still, we humbly submit, be for the determination of the jury.

WHEREFORE, Petitioner respectfully prays This Honorable Court to grant the Petition For Writ of Certiorari to the end that on review, the Circuit Court may be directed to reverse its judgment.

Respectfully submitted,

JOHN J. WATTS,
P. O. Box 1031,
Odessa, Texas,
and
ROBERT L. IVY,
Oil & Gas Bldg.,
Fort Worth, Texas,

Attorneys for Petitioners.

CERTIFICATE OF SERVICE

I hereby certify that I have this day deposited in the United States mail a true and correct copy of the above Petition For Writ of Certiorari to the Honorable Newton Gresham, Bank of the Southwest Bldg., Houston 2, Texas, and to the Honorable W. B. Browder, P. O. Box 670, Midland, Texas, counsel for Respondent, Sinclair, and that I further deposited in the United States mail a copy to the Honorable Henry D. Akin, 1600 Republic National Bank Bldg., Dallas, Texas.

APPENDIX

U. S. COURT OF APPEALS
FILED
JAN 23 1962
EDWARD W. WADSWORTH
CLERK

No. 18,814

In the
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETE BLACK,
Appellant,

v.

SINCLAIR OIL AND GAS COMPANY,
Appellee.

MOTION TO RECALL AND FURTHER STAY THE ISSUANCE OF THE MANDATE

TO SAID HONORABLE COURT:

Now comes Appellant, by and through is attorney of record and respectfully moves the Court to recall the mandate heretofor entered affirming the judgment of the United States District Court in and for the Western District of Texas, Pecos Division, for the reason that Appellant intends, within 90 days of the date Motion for Rehearing was overruled, to file application to the Supreme Court of the United

States for a writ of certiorari in order that review might be obtained; that such recall of the mandate is necessary to prevent injustice for the reason that unless the mandate is recalled, Appellant will be denied his right to review by the Supreme Court of the United States.

WHEREFORE, premises considered, appellant prays the Court to recall and further stay the mandate in this cause pending such action.

JOHN J. WATTS
P. O. Box 1031
Odessa, Texas

By: s TOM SNEED
ATTORNEY FOR
APPELLANT

CERTIFICATE OF SERVICE AND GOOD FAITH

I, Tom Sneed, Attorney for Appellant in the above cause, do hereby certify that a true and correct copy of the Motion to Recall and Further Stay the Issuance of the Mandate has been furnished counsel for the adverse party and that this Motion has been made in good faith and not the purpose of delay.

Witness my hand this day of January, 1962.

s TOM SNEED

U. S. COURT OF APPEALS
FILED
JAN 25 1962
EDWARD W. WADSWORTH
CLERK

In the

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 18814

PETE BLACK,

Appellant,

v.

SINCLAIR OIL & GAS COMPANY,

Appellee.

ON CONSIDERATION of the motion of Appellant for recall and stay of judgment issued as mandate in the above numbered and entitled cause, to enable Appellant to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, IT IS ORDERED that the judgment issued as mandate to the Clerk of the United States District Court at Pecos, Texas, on January 16, 1962, be recalled and stayed to and including February 23, 1962, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within said period there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that certiorari petition and record have been filed. It is further ordered that the Clerk shall

issue the judgment as mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the above period unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

/s/ BEN F. CAMERON
UNITED STATES CIRCUIT JUDGE

January 24, 1962

In the
UNITED STATES COURT OF APPEALS,
FOR THE FIFTH CIRCUIT

No. 18814

PETE BLACK,
Appellant,

v.

SINCLAIR OIL & GAS COMPANY,
Appellee.

Appeal from the United States District Court for the Western District of Texas

(September 27, 1961)

Before TUTTLE, Chief Judge, and CAMERON and JONES, Circuit Judges.

CAMERON, Circuit Judge: Appellant Pete Black appeals from a judgment entered upon instructed verdict in favor of appellee Sinclair Oil & Gas Company.[1] Black was an experi-

[1] Sinclair's motion concluded:

"Wherefore, for the reasons stated in its Motion for Instructed Verdict made at the close of all of the evidence and its Motion for Instructed Verdict made at the close of the plaintiff's case and as set out in this motion, this defendant, Sinclair Oil & Gas Company, moves and prays the Court that judgment be rendered and entered in its favor, notwithstanding the fact that the jury was discharged be-

enced oil driller and was an employee of Lee Brown Drilling Company, an independent contractor, who was engaged in drilling and bringing in a well for Sinclair. As Brown's employee, he was engaged in, and at the time was in charge of, swabbing a well over the top and down into a tank belonging to Sinclair when the riser on the test tank came up and appellant climbed to the top of the tank and put the riser down. He then proceeded to another point on the top of the tank to gauge it and, while so doing, slipped and fell to the ground and was injured. He charged that Sinclair, the owner of the tank, was negligent in a number of particulars hereinafter set out.[2]

We agree with the court below that, under the contract in effect between Sinclair and Brown and the law of independent contractors as recognized in Texas, the evidence estab-

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cause it was unable to reach agreement as to the verdict which should be returned in the cause."

The final judgment contains this recital:

"After the discharge of the jury, the defendant, Sinclair Oil & Gas Company, in proper time filed its motion for judgment in its favor based upon the grounds of its motion for directed verdict, and . . . based upon the evidence adduced at the trial above referred to; . . .

"Thereafter, following due notice to all parties concerned, there came on for hearing on August 12, 1960, the above mentioned motions; and the Court having considered the same and heard the argument of counsel announced and held that the above mentioned motions of the defendant, Sinclair Oil & Gas Company . . . were well taken and should be granted, . . ."

The judgment contained many more recitals taking care of the other parties who are not involved in this appeal, and those recitals have been omitted.

[2]Texas Employers' Insurance Association intervened to recover $8,714.34 it alleged (and he stipulated) it had paid Black as workmen's compensation insurance under the laws of Texas; and Sinclair filed a third party complaint against Brown alleging that Brown's contract with it agreed to indemnify it against any loss or damages which might be assessed against Sinclair. The notice of appeal brought before us, however, only the controversy as it was presented between Black and Sinclair. No point is made as to the form of the judgment which the trial court entered.

lished no actionable negligence against Sinclair, the owner of the property, and that the court correctly entered the judgment appealed from in its favor. What Judge Hutcheson said in opening his specially concurring opinion in this Court's decision of *Gulf Oil Corp. v. Mrs. Eva Wright*, et al., 1956, 236 F. 2d 46, 55, is applicable here.

The plaintiff here particularizes the grounds of negligence relied upon.[4] The complaint brings the case clearly within the ambit of several cases decided by this Court in which the facts were very close to those in the record before us. E. g., *Cook et al. v. Phillips Petroleum Co.*, 1946, 158 F. 2d 10; *Sword v. Gulf Oil Corp.*, 1958, 251 F. 2d 829; *Hurst v. Gulf Oil Corp.*, 1958, 251 F. 2d 836; and *Gulf Oil Corp. v. Bivins*, 1960, 276 F. 2d 753. And cf. *McKee v. Patterson*, S. Ct. Texas, 1941, 271 S. W. 2d 391.

The contract in this case is on a printed form and follows closely, if not precisely, the terms of those discussed in the cases mentioned. The undisputed proof showed that Black

"This is another of the ever increasing confused and confusing suits for damages brought, by a covered and fully compensated employee of an independent contractor, against a compensation carrying employer of the contractor. It was brought on allegations which, if proven, would, under the principles laid down in the controlling Texas decision, make the decedent, as to the work or a part of it, not an employee of an independent contractor but of the defendant itself, and would, therefore, under the Texas Compensation Act, prevent the recovery sought."

[4](a) Sinclair failed to provide plaintiff with a safe place on which to work; (b) failed to warn him that they had not so done; (c) failed to inspect the premises to determine that they did not afford plaintiff a safe place in which to work; (d) failed to provide adequate lighting on top of the tank; (e) failed to provide guard rails on top of the tank; (f) was having the well swabbed over the top and down into the tank; (g) failed to have the well swabbed into the side of the tank; and (h) failed to provide means to prevent the oil from spreading over the top of the tank.

[5]All of these cases, except one, were brought by the same attorney as the one representing plaintiff-appellant here.

was the servant of an independent contractor; that he was an experienced workman in the work being performed; that he had been on top of the tank before and had sent others there, and he knew that it had no guard rail and that it was slippery and was, therefore, dangerous; and that he had completed the adjustment of the riser and was engaged in gauging the tank when he slipped and fell." The large photograph in evidence shows that the top of the tank was nearly level and that there were ten rows of bolts with large nuts affixed, each row having fifteen bolts.

Singularly, the plaintiff devoted a large part of his proof to an attempt to establish that there was a smell of gas at the tank after he had fallen, intending, evidently, to try to get the benefit of the cases discussed by this Court in *Gulf Oil Corp. v. Wright*, supra. But there was no proof that Black was subjected to any gas or that he was asphyxiated or otherwise debilitated by the presence of gas, if there was any gas present at the time he fell. In fact, he testified in detail to the events attending his fall. Additionally, it is worthy of note that the careful enumeration in his complaint of the facts he relied upon as establishing Sinclair's negligence did not mention gas.

No good purpose would be served by the detailed recital of the facts of this case, because they are clearly no stronger, probably not as strong, in Black's favor as the other cases

"I did not say that the guard rail would have kept me from falling because when I fell I was gauging the tank. I had already put the riser back in there and I was gauging the tank."

mentioned. We think that, under the law as developed by the courts of Texas, and as applied by us repeatedly in recent years, the court below was required to direct a verdict in favor of Sinclair. Its action in so doing is

AFFIRMED.

A true copy
Test: EDWARD W. WADSWORTH
Clerk, U. S. Court of Appeals, Fifth Circuit
By /s/ CLARA R. JAMES
Deputy

New Orleans, Louisiana
(SEAL) JAN 26 1962

FILED
29th day of December, 1961
/s/ CLARA R. JAMES
Clerk of the United States Court of Appeals

[464] In the

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18814

PETE BLACK, *Appellant,*

v.

SINCLAIR OIL & GAS COMPANY, *Appellee.*

Appeal from the United States District Court for the Western District of Texas

(December 29, 1961)

ON PETITION FOR REHEARING

Before TUTTLE, Chief Judge, and CAMERON and JONES, Circuit Judges.

PER CURIAM.

IT IS ORDERED that appellant's petition for rehearing be, and it is hereby DENIED.

JUDGMENT.

Extract from the Minutes of September 27, 1961.

No. 18814

PETE BLACK,

versus

SINCLAIR OIL & GAS COMPANY.

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellant, Pete Black, and the surety on the appeal bond herein, Western Surety Company, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

* * * * *

[321] (Caption omitted)

(Filed in Clerk's Office May 6, 1960.)

MOTION FOR INSTRUCTED VERDICT OF DEFENDANT, SINCLAIR OIL & GAS COMPANY

TO THE SAID HONORABLE COURT:

Now comes the Defendant, Sinclair Oil & Gas Company, and after all parties have rested their cases, and announced to the Court that they have no further evidence to offer, and within due and proper time, moves the Court to instruct the jury to return a verdict against the Plainitff, Pete Black, and in favor of Sinclair Oil & Gas Company, for the following reasons:

1.

The ownership of property does not render the owner thereof liable for injuries sustained by an employee of an independent contractor who entered upon the premises as a part of his employment with such independent contractor. Sinclair Oil & Gas Company had a contract, which is in evidence, with Lee Brown Drilling Company, an independent contractor, the employer of the Plaintiff, Pete Black. Sinclair Oil & Gas Company was under no duty to furnish the employees of Lee Brown, including the Plaintiff, Pete Black, with a safe place to work. Sinclair was only required to warn Lee Brown Drilling Company and its employees of any hidden dangers of which Sinclair knew or in the exercise of ordinary care should have known, only provided the Plaintiff, Pete Black, did not know of the exis-[322]tence of such condition, whether it be dangerous or otherwise. There is no evidence in this record to show or even indicate that the

Plaintiff, Pete Black, did not have actual knowledge of the conditions then and there existing; in fact, all of the evidence, and certainly the great and overwhelming weight and preponderance of the evidence, shows and establishes that the Plaintiff, Pete Black, had knowledge of the conditions then existing when he went on the tank, that as a result of his going on the tank as a part of his regular duties he slipped and fell and suffered injuries. All of the evidence shows and establishes, and certainly the great weight and preponderance of the evidence shows and establishes, that Pete Black went upon such tank voluntarily with knowledge of the conditions then and there existing. The said employee of Lee Brown Drilling Company having knowledge of the conditions then existing, the Defendant Sinclair was under no duty to furnish Black with another or different place of work or to warn him of the dangerous condition. There being no duty which was violated by Sinclair, and there being no duty which Sinclair failed to perform, the question of negligence is not reached, and the verdict should be instructed in favor of Sinclair upon such grounds.

2.

In this case all of the evidence shows and establishes, and there is no evidence to the contrary, that the Defendant, [323] Sinclair Oil & Gas Company, was merely the lease owner which had turned over the premises to the independent contractor, Lee Brown Drilling Company. There cannot be any presumption of negligence on the part of Sinclair merely because it has been shown that an injury was sustained by the Plaintiff, Pete Black. The only duty which rested upon

Sinclair was the duty to warn Pete Black or the other employees of the drilling contractor of any dangers of which Sinclair knew or in the exercise of ordinary care should have known at the time when the work was being done. There is no evidence that Sinclair knew of any dangers which were unknown to the Plaintiff or the other employees of the drilling contractor. In fact, the great and overwhelming weight and preponderance of the evidence shows and establishes that Sinclair did not know and that in the exercise of ordinary care it should not have known of any danger or dangerous condition which was unknown to the Plaintiff, Pete Black, or the other employees of the drilling contractor. Therefore, there is no evidence upon which an issue concerning such matter can be submitted to the jury, and further in this connection, if such an issue be submitted and the jury find that Sinclair had any such knowledge, the Court would necessarily have to disregard such answer and render judgment notwithstanding the verdict.

3.

All of the evidence shows and establishes, and certainly [324] the great weight and preponderance of the evidence so shows and establishes, that the danger with which the Plaintiff, Pete Black, became involved in the accident in question was known to him or in the exercise of ordinary care should have been known to him, and that such danger was known to his employer, Lee Brown Drilling Company, or in the exercise of ordinary care should have been known to said employer, so that there be any failure to warn it was Lee Brown Drilling Company who was guilty of such failure

and not the Defendant, Sinclair Oil & Gas Company, and the failure of Lee Brown Drilling Company to so warn was the sole proximate cause of the accident in question.

4.

All of the evidence shows and establishes, and certainly the great weight and preponderance of the evidence so shows and establishes, that the Plaintiff, Pete Black, knew or in the exercise of ordinary care should have known of the condition of the tank on which he went voluntarily and if it be unsafe that said Plaintiff knew that it was unsafe or was in better position to know that it was unsafe than the Defendant, Sinclair Oil & Gas Company, and that the Plaintiff, Pete Black, knew the danger of so going on the tank and was in better position to know of such danger than the Defendant Sinclair; so that the jury should not be left to determine that question then remaining which is solely a question of law, which law is [325] that the Defendant Sinclair was neither under any duty to Pete Black which it violated nor was it guilty of any negligence.

5.

By the testimony of Pete Black himself, and by the testimony adduced by said Plaintiff, said Plaintiff went on top of the test tank at a time when it was slippery and when it was not guarded by a rail or by a walkway, when in the exercise of ordinary care the Plaintiff, Pete Black, should have known that the tank was slippery and was not guarded, and by going thereupon he was therefore guilty of contribu-

tory negligence which was a proximate cause of the accident and the resulting injuries.

6.

All of the evidence shows and establishes, and certainly the great weight and preponderance of the evidence so shows and establishes, that the premises on which the work was being performed by the drilling contractor and its employees was reasonably safe for the Plaintiff, Pete Black, when his employer, Lee Brown Drilling Company, commenced its work and while said employer was doing such work under its contract with the Defendant Sinclair, and that the accident in question and the injuries of Pete Black resulted from the conditions which developed during the progress of the work as conducted by said Pete Black and his employer, Lee Brown Drilling Company, and the other em-[326]ployees of said drilling company, so that there is no liability on the part of the Defendant, Sinclair Oil & Gas Company.

7.

Sinclair Oil & Gas Company, the lease owner, may not be held responsible for the injuries to Pete Black who was an employee of the independent contractor, Lee Brown Drilling Company. All of the evidence and particularly the testimony of the Plaintiff, Pete Black, as well as the witnesses put upon the stand by said Plaintiff, is to the effect that the accident resulted from the transitory conditions incident to the progress of the work which the independent contractor had agreed to perform. Therefore, since the accident and resulting injuries were brought about by the transitory and

changing conditions which arose in the progress of the work and without the knowledge or negligence of the Defendant Sinclair, then the verdict must be for the Defendant Sinclair and against the Plaintiff, Peté Black.

8.

The evidence adduced in the entire trial of the case shows that even if Sinclair had knowledge of the dangerous condition, which is not admitted but is denied, yet the Plaintiff, Pete Black, was upon the premises and went upon the tank knowing of the danger of going thereupon or went upon the tank when [327] he should have known in the use of reasonable care that such going upon the top of the tank was dangerous. The going upon the tank under such conditions and at a time when Pete Black knew and observed the condition or in the use of reasonable care should have known of such condition was negligence on the part of Black himself, and in such connection Pete Black was guilty of contributory negligence, and the verdict must be against him and in favor of the Defendant Sinclair Oil & Gas Company.

9.

If there be sufficient evidence to raise a fact issue that Plaintiff's fall was due to inhalation of hydrogen sulphide gas, nevertheless, it is undisputed that Plaintiff received sufficient of such gas to cause him to fall only because of the coming loose of the riser, a transitory condition not shown to have been known by Defendant, Sinclair Oil & Gas Company.

WHEREFORE, the Defendant, Sinclair Oil & Gas Company, moves the Court to instruct the jury to return a verdict against the Plaintiff and in favor of Sinclair, or in the alternative, that the Court discharge Sinclair and instruct the jury that any verdict which might be rendered against Sinclair should be and must be rendered over and against the defendant, Lee [328] Brown Drilling Company.

Respectfully submitted,

FULBRIGHT, CROOKER, FREEMAN, BATES & JAWORSKI,
Houston, Texas,

By: /s/ NEWTON GRESHAM

STUBBEMAN, MCRAE, SEALY & LAUGHLIN,
Midland, Texas,

By: /s/ W. B. BROWDER, JR.

ORDER OF THE COURT

The above and foregoing motion having been duly and timely presented to the court on the 8th day of October, 1959, and the court being of the opinion that such motion should be overruled and refused, it was then and there ordered, adjudged and decreed by the court that said motion be and it was overruled and refused.

/s/ R. E. THOMASON
Judge

Dated and Signed this
30th day of April, 1960.

[329] (Caption Omitted)

(Filed in Clerk's Office May 7, 1960.)

MOTION FOR JUDGMENT OF DEFENDANT, SINCLAIR OIL & GAS COMPANY

TO SAID HONORABLE COURT:

Now comes Sinclair Oil & Gas Company, defendant in this cause, and moves the Court to render judgment in its favor and against the plaintiff, Pete Black, for the reasons and upon the grounds set forth in its Motion for Instructed Verdict filed in the cause at the close of all evidence and after all parties had rested their cases, and as previously shown in its Motion for Instructed Verdict at the Close of Plaintiff's Case and after the plaintiff had announced to the Court that he had rested his case, as follows:

1.

There was no evidence that this defendant violated or failed to perform any duty which it owed to the plaintiff, Pete Black.

2.

All of the evidence, and the great and overwhelming weight and preponderance of the evidence, showed and established that this defendant neither violated nor failed to perform any duty which it owed to the plaintiff, Pete Black.

[330] 3.

There was no evidence of probative force showing that this defendant was guilty of any negligent conduct or act which proximately caused the accident in question or the injuries suffered by the plaintiff, Pete Black.

4.

All of the evidence, and the great and overwhelming weight and preponderance of the evidence, showed and established that this defendant was not guilty of any negligent conduct or act which proximately caused the accident in question or the injuries suffered by the plaintiff, Pete Black.

5.

The evidence showed and established that this defendant owned and had an oil and gas lease on which a well was being drilled by Lee Brown Drilling Company, an independent contractor, under written contract between said drilling company and this defendant, and that the plaintiff, Pete Black, went on the premises as an employee of said Lee Brown Drilling Company. This defendant was under no duty to furnish either Pete Black or any of the other employees of Lee Brown Drilling Company, with a safe place to work. This defendant was only required to warn Lee Brown Drilling Company and its employees of any hidden dangers of which this defendant knew or in the exercise of ordinary care should have known, *provided* the plaintiff, Pete [331] Black, did not know of the existence of such dangerous conditions. All of the evidence, and the great and overwhelming weight and preponderance of the evidence, showed and established that the plaintiff, Pete Black, had knowledge of the conditions then and there existing on the top of the test tank when he went thereon and then slipped and fell and suffered the injuries of which he here complains. All of the evidence showed and established, and the great and overwhelming

weight and preponderance of the evidence showed and established, that Pete Black went upon the said tank voluntarily with knowledge of the conditions then and there existing. Having gone upon the tank voluntarily with knowledge of the conditions then and there existing, the plaintiff, Pete Black, assumed the risk, or as it is sometimes known, he became subject to the burden of the doctrine of volenti non fit injuria.

The plaintiff, Pete Black, is bound to his own testimony and theory of the case, and he testified, in part, both on direct and cross-examination, as follows:

Q (By Mr. Watts) Mr. Black, were you the driller on this job?

A That is right.

Q For this company?

A Yes, sir.

Q *Had you been up on the top of this test tank before this accident occurred?*

A *Yes, sir, I had.*

Q Now, did you believe that there was any danger of [332] your being gassed or falling off the tank when you went up there looking at the condition of it like it was before?

A *I would say the tank was unsafe.*

Q You mean—when did you find out that the tank was unsafe, before or after this accident?

A *Well, I knew the tank was unsafe before the accident.*

Q (By Mr. Browder) *Now, you had experience with test tanks even, hadn't you?*

A *Yes, sir, I had experience with them.*

Q *Well, I mean, in swabbing a well, you used the test tanks to hold the oil that comes up when you swab?*

A *Yes, sir, that is right.*

Q Now, I believe that you were in this accident on December 29, 1955?

A That is right.

Q And you had climbed up on the tank, hadn't you?

A I had been on the tank, yes.

Q *You had been on the tank once or twice before the time you fell?*

A *Well, I wouldn't say twice, but I would say I had been on the tank*, now, I couldn't say whether I had been on it once or twice, but *I know I had been on the tank*, I had been on it.

[333] Q And when you fell you had gone up on the tank to put the riser back?

A Yeah, that is right.

Q *And you had done that and had gone over to do your gauging, hadn't you?*

A *That is right.*

Q And when you went up there was the top of the tank slippery?

A Yes, sir.

Q And, I mean, you went on up and you put the riser in, didn't you?

A That is right.

Q Now, you just didn't come right straight down, did you, you stopped to do your gauging?

A *I stopped to gauge the tank, yes, sir.*

Q *Was the tank slippery?*

A *Yes, sir.*

Q *And you knew that?*

A *Yes.*

Q Well, sure you knew it: *And it was dangerous?*

A *Yes, I knew it was dangerous.*

Q *And the rail wasn't on the tank?*

A *No, it wasn't.*

Q *You had known that for sometime?*

A *Yes, I knew there was no rail on the tank.*

Q *Knowing the situation, though, you went up there to gauge the tank, didn't you?*

[334] A *Yeah,* I gauged it.

Q *You knew it was dangerous?*

A *I knew it was slick and I knew it was dangerous, yeah.*

The plaintiff, Pete Black, had knowledge of the conditions then and there existing in his work and the dangerous condition on top of the tank: therefore, this defendant was under no duty to furnish the plaintiff Black with another or different kind or place of work or to give him any additional warning. The verdict should have been instructed in favor of this defendant and, the jury having failed to return a verdict, judgment should now be entered for this defendant.

6.

There was no evidence that this defendant knew of any dangers which were unknown to the plaintiff, Pete Black, or the other employees of the drilling contractor. In fact, the great and overwhelming weight and preponderance of the evidence showed and established that this defendant did not

know, and that in the exercise of ordinary care it could not have known, of any danger or dangerous condition which was unknown to the plaintiff, Pete Black, or the other employees of the drilling contractor. Therefore, there was no evidence of negligence on the part of this defendant.

7.

All of the evidence showed and established, and the great [335] weight and preponderance of the evidence showed and established, that the danger and dangerous condition with which the plaintiff, Pete Black, became involved in the accident in question, was known to him or in the exercise of ordinary care should have been known to him, and that such danger and dangerous condition was known to his employer, Lee Brown Drilling Company, or in the exercise of ordinary care should have been known to his said employer, so that, if there were any failure to warn, it was the employer, Lee Brown Drilling Company, which was guilty of such failure and not this defendant, and the failure of such employer to so warn was the sole proximate cause, or, in the alternative, a new and independent cause, of the accident in question, and no act or failure to act on the part of this defendant was a proximate cause of such accident.

8.

All of the evidence showed and established, and the great weight and preponderance of the evidence showed and established, as did the testimony of the plaintiff, Pete Black, that said plaintiff went on top of the test tank at a time when it was slippery and when it was not guarded by a rail or by a

walkway, when plaintiff knew that the tank was slippery and not guarded, and, by going thereupon, as a matter of law, plaintiff was guilty of contributory negligence which was a proximate cause of the accident in question and the resultant injuries.

[336] 9.

All of the evidence showed and established, and the great weight and preponderance of the evidence so showed and established, as did the testimony of the plaintiff himself, that the premises on which the work was being performed by the drilling contractor and its employees were reasonably safe for the plaintiff and the other employees of said drilling contractor, when the tank was furnished and when Pete Black's employer commenced its work, and that the accident in question and the injuries of the plaintiff resulted from the transitory conditions which developed during the progress of the work conducted by plaintiff and his employer, for none of which this defendant would be liable.

10.

There was no evidence of probative force to show or raise a fact issue that plaintiff's fall on and from the top of the tank was due to the inhalation of gas. All of the evidence showed and established, and the great and overwhelming weight and preponderance of the evidence showed and established, that plaintiff's fall was not due to the inhalation of gas. Further, however, all of the evidence, including the testimony of the plaintiff, Pete Black, showed and established that plaintiff was experienced in the oil fields and in

the [337] operation and drilling of wells in such fields and that plaintiff knew the conditions present at the top of the tank, for he had been up there before. There was no hidden danger either by reason of the slippery condition of the top of the tank or the lack of a rail or other guard or the presence of gas. And even if gas were present, the work the plaintiff, Pete Black, was doing gave rise to that condition. Under such circumstances, the court should have instructed the jury to return a verdict for this defendant, and having failed to so instruct the jury and the jury having failed to return a verdict, the court should now render judgment for this defendant.

WHEREFORE, for the reasons stated in its Motion for Instructed Verdict made at the close of all of the evidence and its Motion for Instructed Verdict made at the close of plaintiff's case and as set out in this motion, this defendant, Sinclair Oil & Gas Company, moves and prays the court that judgment be rendered and entered in its favor, notwithstanding the fact that the jury was discharged because it was unable to reach agreement as to the verdict which should be returned in the cause.

Respectfully submitted,

FULBRIGHT, CROOKER, FREEMAN, BATES & JAWORSKI,
By: /s/ NEWTON GRESHAM

STUBBEMAN, McRAE, SEALY & LAUGHLIN,
By: /s/ W. B. BROWDER, JR.

Attorneys for Defendant, Sinclair Oil & Gas Company.

CERTIFICATE OF SERVICE

A copy of the foregoing Motion for Judgment has been delivered to the opposing counsel by depositing same in the United States mail, this the 6 day of May, 1960, addressed to Mr. John J. Watts, P. O. Box 1031, Odessa, Texas.

/s/ W. B. BROWDER, JR.

[339] (Caption Omitted) (Filed in Clerk's Office May 7, 1960.)

MOTION FOR SUMMARY JUDGMENT OF DEFENDANT SINCLAIR OIL & GAS COMPANY

TO SAID HONORABLE COURT:

Sinclair Oil & Gas Company, defendant in this cause, moves the Court to enter summary judgment in its favor and against the plaintiff, Pete Black, as to the whole of the claim of said plaintiff and the intervenor, Texas Employers' Insurance Association, for the following reasons:

1.

All persons who had or might have knowledge of the accident of December 29, 1955, in which plaintiff was involved, and as a result of which plaintiff received injuries, have heretofore testified in the trial of this cause, and their testimony reflects and shows and establishes all of the facts of the accident and all of the matters and things involved in this suit. The testimony of each of said witnesses as given in the trial of the cause is being transcribed, and when such transcription is completed, such record and testimony of all of those persons having knowledge of the facts of the case will be filed herein. When filed, such record will reflect and show the testimony of all of the witnesses to the transaction and matters involved in this suit.

2.

This defendant here refers to and incorporates herein the [340] testimony of each and all of the witnesses adduced in

the trial of this cause from October 5 through 8, 1959, the same as if copied and incorporated herein in full.

3.

The above mentioned and referred to testimony shows and establishes the following facts and matters, to-wit:

(1) This defendant violated no duty owed by it to the plaintiff, Pete Black.

(2) This defendant was guilty of no negligent act which proximately caused the accident in question or the injuries suffered by the plaintiff, Pete Black.

(3) The premises of this defendant was reasonably safe and free of hidden danger of which this defendant knew or should have known when Lee Brown Drilling Company, as an independent contractor, commenced the drilling of the well it had agreed in writing to drill for this defendant. If the premises thereafter became unsafe, such condition resulted from the work which the plaintiff, Pete Black, and his fellow employees and his employer, Lee Brown Drilling Company, were performing and from the conditions which arose in the performance of such work. The danger and dangerous condition which arose during the operations conducted by the independent contractor, resulted from the method and manner of the performance of the work and from the conditions then and there existing, over which this defendant had no control or right of control. If it was this defendant's premises which became unsafe, the unsafe condition thereof re-[341] sulted from transitory conditions which arose during the progress of the work which the contractor had contracted to

perform and in which the plaintiff, Pete Black, as an employee of such independent contractor, was engaged in doing and performing at the time of the accident. By reason thereof, this defendant is not liable to the plaintiff for the injuries and damages which he claims.

(4) This defendant owned and had an oil and gas lease on which a well was being drilled by Lee Brown Drilling Company, an independent contractor. The plaintiff, Pete Black, went on the premises as an employee of said drilling contractor. The plaintiff, Pete Black, had knowledge of the conditions then and there existing when the well was being drilled and while it was being swabbed, and said plaintiff knew that the well was being swabbed into the test tank, which test tank had no rail or other guard on its top. Plaintiff, Pete Black, had knowledge of the conditions then and there existing on the top of the tank, and he voluntarily went thereon and when he went thereon and slipped and fell and suffered the injuries of which he here complains he knew of the condition there existing. Pete Black went upon the tank voluntarily with knowledge of the conditions then and there existing and assumed the risk. By reason thereof, plaintiff is barred from recovery by reason of his assumption of the risk and the doctrine of volenti non fit injuria, and this defendant is not liable to the plaintiff for the injuries of which he now complains.

[342] (5) The danger and dangerous condition with which the plaintiff, Pete Black, became involved in the accident in question, was known to him or in the exercise of ordinary care should have been known to him, and such danger and

dangerous condition was known to his employer, Lee Brown Drilling Company, or in the exercise of ordinary care should have been known to such employer. If there were any failure to warn the plaintiff of the conditions then and there existing, it was his employer, Lee Brown Drilling Company, which was guilty of such failure and not this defendant. The failure of the employer, Lee Brown Drilling Company, to warn was the sole, proximate cause, or, in the alternative, a new and independent cause, of the accident in question, and no act or failure to act on the part of this defendant was a proximate cause of such accident, and by reason thereof this defendant is not liable to the plaintiff for the damages which he here claims.

(6) Plaintiff, Pete Black, went on top of the test tank at a time when it was slippery and when it was not guarded by a rail or by a walkway, when plaintiff knew that the tank was slippery and not guarded, and, by going thereupon, plaintiff was guilty of contributory negligence which was a proximate cause of the accident in question and the resultant injuries, by reason of which contributory negligence on the part of plaintiff this defendant is not liable.

(7) The fall of the plaintiff, Pete Black, was not due to the inhalation of gas; however, the plaintiff claims that such fall was, in part, due to the inhalation of gas, but [343] plaintiff was experienced in the oil fields and in the operation and drilling of wells in such fields and plaintiff knew the condition at the top of the tank, for he had been up there before the time the accident occurred. There was no hidden danger, either by reason of the slippery condition of the top of the tank or the lack of a rail or other guard thereon or the

presence of gas. Further, if there were any gas, this condition arose as a result of the work of swabbing being done by the plaintiff, Pete Black, and his fellow employees and their employer, Lee Brown Drilling Company, and not as a result of any work done or operations controlled by this defendant. Under this circumstance, the court should render summary judgment that plaintiff take nothing by his suit against this defendant.

(8) No agent, employee or representative of this defendant was present at or immediately before the time the accident occurred. The plaintiff, Pete Black, was not acting under the instructions or directions of this defendant or any of its agents, representatives or employees. This defendant's only connection to, or relation with, the accident in question is that it wanted a well drilled and in writing employed an independent contractor to drill such well, and during the drilling and completing of the well an employee of the independent contractor fell and was injured. Under such circumstances no liability should be imposed upon or against this defendant.

(9) The plaintiff, Pete Brown, was experienced in the work he was doing and performing and voluntarily proceeded and [344] went upon the top of the tank in question and he thereby voluntarily exposed himself to the risk and danger of which he here complains and he assumed the risk and danger which brought about and proximately caused his accident and the resultant injuries, so that under and pursuant to the doctrine of volenti non fit injuria this defendant should not here be held liable.

WHEREFORE, and for all of which reasons, this defendant, Sinclair Oil & Gas Company, moves and prays the court to enter summary judgment in its favor that the plaintiff, Pete Black, take nothing against it and that the intervenor, Texas Employers' Insurance Association, also taken nothing about it.

Respectfully submitted,

FULBRIGHT, CROOKER, FREEMAN, BATES & JAWORSKI,

By: /s/ NEWTON GRESHAM

STUBBEMAN, MCRAE, SEALY & LAUGHLIN,

By: /s/ W. B. BROWDER, JR.

CERTIFICATE OF SERVICE

A copy of the foregoing Motion for Summary Judgment has been delivered to the opposing counsel by depositing same in the United States Mail, this the 6 day of May, 1960, addressed to Mr. John J. Watts, P. O. Box 1031, Odessa, Texas.

/s/ W. B. BROWDER, JR.

[345] (Caption Omitted)

(Filed in Clerk's Office October 26, 1960.)

FINAL JUDGMENT

On the 5th day of October, 1959, the above entitled and numbered cause came on for trial, when appeared plaintiff, Pete Black, in person and by counsel, intervenor, Texas Employers Insurance Association, by counsel, Sinclair Oil & Gas Company, by counsel, and third-party defendant, Lee Brown, d b a Lee Brown Drilling Company, by counsel, and all parties announced ready for trial. A lawful jury was impaneled and sworn, the pleadings were stated and the evidence commenced and continued until the 8th day of October, 1959, when all evidence was closed and all parties rested and closed their vases. The defendant, Sinclair Oil & Gas Company, and the third-party defendant, Lee Brown, d b a Lee Brown Drilling Company, then filed and presented their respective written motions for directed verdicts, which motions were by the Court overruled. The case was then argued to the jury and the charge of the Court heard by the jury and the jury retired to consider their verdict. Thereafter, following hours of deliberation by the jury, the Court discharged the jury from further consideration of the case because of their inability to agree and no jury verdict was returned to the cause.

After the discharge of the jury, the defendant, Sinclair Oil & Gas Company, in proper time filed its motion for

judgment in its favor based upon the grounds of its motion for directed [346] verdict, and its motion for summary judgment based upon the evidence adduced at the trial above referred to; and the third-party defendant, Lee Brown, d b a Lee Brown Drilling Company, in proper time filed its motion to dismiss the third-party complaint and or to render summary judgment in its favor on said third-party complaint.

Thereafter, following due notice to all parties concerned, there came on for hearing on August 12, 1960, the above mentioned motions; and the Court having considered the same and heard the argument of counsel announced and held that the above-mentioned motions of the defendant, Sinclair Oil & Gas Company, for judgment and for summary judgment were well taken and should be granted, and that because of the granting of such motions of defendant, Sinclair Oil & Gas Company, judgment should also be entered that defendant and third-party plaintiff, Sinclair Oil & Gas Company, take nothing by its third-party complaint against third-party defendant, Lee Brown, d b a Lee Brown Drilling Company;

It is accordingly ORDERED, ADJUDGED and DECREED by the Court that plaintiff, Pete Black, and intervenor, Texas Employers Insurance Association, do have and take nothing by their suit as against defendant, Sinclair Oil & Gas Company, and that such defendant go hence without day, and that defendant and third-party plaintiff, Sin-

clair Oil & Gas [347] Company, do have and take nothing by its third-party action against third-party defendant, Lee Brown, d/b/a Lee Brown Drilling Company, and that such third-party defendant go hence without day, and that defendant and third-party defendant recover their costs of plaintiff and of intervenor.

It is further ORDERED, ADJUDGED and DECREED, however, that the foregoing judgment in favor of third party defendant Lee Brown, d/b/a Lee Brown Drilling Company and against defendant Sinclair Oil & Gas Company upon the third party complaint of said defendant Sinclair Oil & Gas Company shall become final only if and when the foregoing judgment in favor of defendant Sinclair Oil & Gas Company and against plaintiff Pete Black and intervenor Texas Employers Insurance Association becomes final, and if for any reason the foregoing judgment in favor of defendant Sinclair Oil & Gas Company and against plaintiff Pete Black and intervenor, Texas Employers Insurance Association is vacated or reversed, then that the foregoing judgment in favor of third party defendant Lee Brown, d/b/a Lee Brown Drilling Company and against defendant Sinclair Oil & Gas Company upon said third-party complaint shall be vacated and of no force and effect.

To which judgment of the Court the plaintiff, Pete Black, and the intervenor, Texas Employers Insurance Association, duly excepted.

[348] RENDERED and ENTERED this 26 day of Oct. 1960.

/s/ R. E. THOMASON
Judge Presiding
Entered in Minutes
Volume J: Page 695

APPROVED AS TO FORM:

/s/ JOHN J. WATTS
Attorney for Plaintiff

/s/ W. O. SHAFER
Attorney for Intervenor

/s/ NEWTON GRESHAM

/s/ W. B. BROWDER, JR.
Attorney for Defendant

/s/ HENRY D. AKIN
Attorney for Third-party Defendant

[349] (Caption Omitted)

(Filed in Clerk's Office November 8, 1960.)

NOTICE OF APPEAL

TO THE HONORABLE JUDGE OF SAID COURT:

Comes now Pete Black, plaintiff, and gives notice that he hereby appeals to the Circuit Court of Appeals of the United States for the Fifth Circuit at New Orleans, Louisiana, from the judgment of the United States District Court for the Western District of Texas, Pecos Division at Pecos, Texas, which judgment was rendered against the plaintiff upon defendant's motion for summary judgment and motion for judgment.

Plaintiff, on this appeal, shall list all the points relied upon by defendant in its motion for summary judgment and motion for instructed verdict, which two motions upon the part of the defendant constitute the basis for the final judgment entered by the trial Court in this cause, and this is the judgment appealed from, said judgment having been entered on October 26, 1960.

The attorneys of record for the defendant, Sinclair Oil & Gas Company, are Mr. Newton Gresham of Houston, Texas, Mr. Henry D. Akin of Dallas, Texas, Mr. W. B. Browder of Midland, Texas, and Mr. W. O. Shafer of Odessa, Texas, and notification of the party defendant herein shall be given by the clerk mailing a copy of the notice of appeal to the defendant's attorneys.

/s/ TOM SNEAD

JOHN J. WATTS,
Box 1031,
Odessa, Texas,
Attorney for Plaintiff.

[350] (Caption Omitted)

(Filed in Clerk's Office November 8, 1960.)

APPEAL BOND

THE STATE OF TEXAS)
COUNTY OF ECTOR)

WHEREAS, in the above entitled and numbered cause pending in the United States District Court for the Western District of Texas, Pecos Division, Pecos, Texas, at a regular term of said Court, to-wit, on the 26th day of October, 1960, a summary judgment was entered against the plaintiff by the Court in favor of the defendant, Sinclair Oil & Gas Company.

NOW, THEREFORE, KNOW ALL MEN BY THESE PRESENTS: That we, Pete Black, as principal and Western Surety Company as surety, are held and firmly bound unto the defendant, Sinclair Oil & Gas Company, in the penal sum of $250.00, to the payment of which well and truly to be made we do hereby bind ourselves and our heirs, executors and administrators, firmly by these presents. The condition of the above obligation is such that this bond is given to secure the payment of costs if the appeal in this case is dismissed or the judgment affirmed, or such costs as the Appellate Court may require if the judgment is modified.

Now, Therefore, if the said Circuit Court of Appeals for [351] the Fifth Circuit at New Orleans, Louisiana should reverse and remand the above entitled and numbered cause,

then this obligation shall be null and void; otherwise to be and remain in full force and effect.

Witness our hands this 31st day of October, 1960.

/s/ PETE BLACK
Principal

WESTERN SURETY COMPANY
by BRAD LONG
Attorney-in-Fact
Sureties

(SEAL)

(Power of Attorney attached to Original Bond but not copied here.)

[352] (Caption Omitted)

(Filed in Clerk's Office November 8, 1960.)

STATEMENT OF POINTS UPON WHICH APPELLANT RELIES FOR REVERSAL

The appellant, upon this appeal, will submit the following reasons:

Point No. One

The Court erred in granting the defendant's motion for summary judgment.

Point No. Two

The Court erred in granting the defendant's motion for summary judgment.

The above Points constitute all the points that will be relied upon by the appellant for reversal upon this appeal.

Respectfully submitted,

/s/ TOM SNEED

JOHN J. WATTS,
P. O. Box 1031,
Odessa, Texas,
Attorney for Appellant.

[353] (Caption Omitted)

(Filed in Clerk's Office November 8, 1960.)

DESIGNATION OF CONTENTS OF RECORD

Plaintiff requests that the record on appeal in the above styled and numbered cause shall consist of the following instruments:

1. Plaintiff's Original Petition.
2. Defendant's Original Answer.
3. Defendant's Motion for Instructed Verdict at close of all evidence.
4. Defendant's Motion for Judgment.
5. Defendant's Motion for Summary Judgment.
6. Final Judgment for Defendant.
7. Plaintiff's Notice of Appeal.
8. Appeal Bond.
9. Statement of Points Upon Which Appellant Relies for Reversal.
10. Designation of Contents of Record.
11. Statement of Facts, exclusive of Medical Evidence.

Respectfully submitted,

JOHN J. WATTS,
P. O. Box 1031,
Odessa, Texas,

By /s/ TOM SNEED
Attorney for Plaintiff.

[354] (Caption Omitted)

(Filed in Clerk's Office January 18, 1961.)

APPELLEE'S DESIGNATION OF CONTENTS OF RECORD ON APPEAL

Sinclair Oil & Gas Company, defendant in this cause, and appellee on appeal, pursuant to Rule 75(a) of the Federal Rules of Civil Procedure, designates in addition to that portion of the Record on appeal designated by plaintiff and appellant, Pete Black, the following portions of the Record and proceedings to be included in the Record to be forwarded to the Clerk of the United States Court of Appeals for the Fifth Circuit at New Orleans, Louisiana:

(1) Motion of defendant, Sinclair Oil & Gas Company, for leave to make Lee Brown, who does business under the trade name of Lee Brown Drilling Company, a party to this action, and the Order of the Court permitting the making of such new party and the filing of the third-party complaint.

(2) Defendant, Sinclair Oil & Gas Company's third-party complaint against Lee Brown, doing business as Lee Brown Drilling Company.

(3) Original Answer of third-party defendant, Lee Brown, doing business as Lee Brown Drilling Company.

(4) Original Plea in Intervention of Texas Employers' Insurance Association, and Order of the Court granting such leave to intervene.

(5) Answer of defendant, Sinclair Oil & Gas Company to Plea of Intervention of Texas Employers' Insurance Association.

(6) Stipulation of the parties, relative to right of recovery of Texas Employers' Insurance Association, in the event plaintiff recovered judgment.

(7) Motion for Instructed Verdict of third-party defendant, Lee Brown, doing business as Lee Brown Drilling Company.

[355] In the "Designation of Contents of Record" filed by plaintiff, "Defendant's Motion for Judgment" is listed as number 4 and "Defendant's Motion for Summary Judgment" is listed as number 5. It is presumed that plaintiff meant to designate and there is being included in the Record the Motion for Judgment of Defendant, Sinclair Oil & Gas Company, and the Motion for Summary Judgment of Defendant, Sinclair Oil & Gas Company; if not, then this appellee requests that said Motion for Judgment of Defendant, Sinclair Oil & Gas Company, be included in the Record.

DATED this 17th day of January, 1961.

Respectfully submitted,

FULBRIGHT, CROOKER, FREEMAN, BATES & JAWORSKI,
STUBBEMAN, MCRAE, SEALY & LAUGHLIN,

By: /s/ W. B. BROWDER, JR.

Attorneys for Appellee

CERTIFICATE OF SERVICE

Service of the above Supplemental Designation was had upon Mr. John J. Watts, attorney for the plaintiff, Pete Black, and Mr. Henry D. Akin, attorney for Lee Brown, doing business as Lee Brown Drilling Company, and Mr. W. O. Shafer, attorney for Texas Employers' Insurance Association, by mailing a copy of same to each of them on this 17th day of January, 1961.

/s/ W. B. BROWDER, JR.

[356] (Caption Omitted)

(Filed in Clerk's Office July 22, 1957.)

MOTION TO FILE THIRD PARTY COMPLAINT AND ORDER OF THE COURT

TO SAID HONORABLE COURT:

Defendant, Sinclair Oil & Gas Company, moves for leave to make Lee Brown, who does business under the trade name of Lee Brown Drilling Company, a party to this action and that there be served upon him appropriate summons and a copy of the third party complaint attached hereto.

STUBBEMAN, MCRAE, SEALY & LAUGHLIN,
Midland, Texas,

By: /s/ W. B. BROWDER, JR.

FULBRIGHT, CROOKER, FREEMAN, BATES & JAWORSKI,
Houston, Texas,

Attorneys for Defendant:

The undersigned, John J. Watts, attorney for plaintiff, acknowledges receipt of copy of the above motion and the attached third party complaint and agrees that without hearing and without further notice to him and without his presence, the court may enter its order granting the above motion making the said Lee Brown, d/b/a Lee Brown Drilling Company, a party of this action and ordering served

upon him appropriate summons [357] and said third party complaint.

This 17th day of July, 1957.

/s/ JOHN J. WATTS
By: JEROME POPE

Odessa, Texas,
Attorney for Plaintiff.

ORDER

On this date, upon the motion of defendant, Sinclair Oil & Gas Company, it is ordered that Lee Brown, d b a Lee Brown Drilling Company, be made a party to this action and that there be served upon him appropriate summons and the third party complaint filed herein against him by said defendant, Sinclair Oil & Gas Company.

July 22, 1957.

/s/ R. E. THOMASON
Judge

Entered in Minutes
Volume I: Page 344

[358] (Caption Omitted)

(Filed in Clerk's Office July 22, 1957.)

THIRD PARTY COMPLAINT

TO SAID HONORABLE COURT:

Plaintiff, Pete Black, has filed against defendant, Sinclair Oil & Gas Company, a complaint, a copy of which is hereto attached as Exhibit A.

I.

As is shown by the pleadings already on file in this cause, plaintiff is a resident of Ector County, Texas, and defendant, Sinclair Oil & Gas Company, is a corporation with an office in Tarrant County, Texas. Third party defendant, Lee Brown, is a resident and citizen of Tarrant County, Texas, in the Fort Worth Division of the Northern District of Texas.

II.

In his complaint, plaintiff, Pete Black, alleges he is entitled to recover damages from defendant because of personal injuries sustained by him while he was employed by third party defendant, Lee Brown, who was engaged in drilling for defendant under a written drilling contract an oil well on the Barbara Cowden Lease in Ector County, Texas. Plaintiff claims that while in the course of his employment for said Lee Brown [359] and while engaged in the operations of said Lee Brown in connection with the drilling of such oil well, he fell on and from a tank being used in the drilling of said well and sustained serious personal injuries.

III.

The written drilling contract above mentioned, which contract is dated October 4, 1955, and was executed by this defendant and by the third party defendant, Lee Brown, and under which said oil well above mentioned was being drilled, provides, among other things, that contractor (the said Lee Brown) agrees to hold Company (this defendant) harmless "from any and all liability for damages to the person and or property of any and all persons resulting from the operations of contractor hereunder." The aforesaid injuries to plaintiff were incurred in connection with operations of the said Lee Brown under said contract and fall within the terms, meaning and provisions of said agreement to hold this defendant harmless. Third party defendant has, therefore, agreed to hold this defendant harmless and to indemnify this defendant from all liability for damages sustained by plaintiff on the occasion complained of in plaintiff's complaint. Third party defendant, Lee Brown, is thoroughly familiar with the above mentioned contract and a copy of the same is in his possession. Such drilling contract is here adopted and pleaded by reference the [360] same as if it were recited in full in this third party complaint.

IV.

Because of the matters and things above pleaded, this defendant, Sinclair Oil & Gas Company, is entitled to recover of third party defendant, Lee Brown, all sums which plaintiff, Pete Black, may recover from this defendant in this suit.

WHEREFORE, defendant, Sinclair Oil & Gas Company, demands judgment against third party defendant, Lee Brown, for all sums which may be adjudged against this defendant, Sinclair Oil & Gas Company, in favor of plaintiff, Pete Black.

STUBBEMAN, MCRAE, SEALY & LAUGHLIN,
Midland, Texas,

By: /s/ W. B. BROWDER, JR.

FULBRIGHT, CROOKER, FREEMAN, BATES & JAWORSKI,
Houston, Texas,

Attorneys for defendant and third party plaintiff, Sinclair Oil & Gas Company.

NOTE: Exhibit A attached to these pleadings, being Plaintiff's Original Complaint, having already been copied in this record beginning on Page 1, same will not be re-copied here.)

[361] (Caption Omitted)

(Filed in Clerk's Office September 5, 1957.)

ORIGINAL ANSWER OF THIRD PARTY DEFENDANT LEE BROWN, D/B/A LEE BROWN DRILLING COMPANY

TO SAID HONORABLE COURT:

Now comes Lee Brown, doing business as Lee Brown Drilling Company, named as third party defendant in the above entitled and numbered cause in the third party complaint filed against him by defendant and third party plaintiff Sinclair Oil & Gas Company, hereinafter called Sinclair, and for answer to such third party complaint, pleads as follows:

FIRST DEFENSE

Said third party complaint fails to state a claim against this third party defendant upon which relief can be granted.

SECOND DEFENSE

This third party defendant admits the allegations contained in paragraph I, in the first sentence of paragraph II, and in the first sentence of paragraph III of said third party complaint, and denies each and every other allegation contained in said third party complaint.

THIRD DEFENSE

And for further and special answer and denial herein, if such be necessary, this third party defendant further pleads as follows:

[362] (a) This third party defendant was a subscriber under the Workmen's Compensation Act of Texas, carrying a

policy of workmen's compensation insurance issued by Texas Employers' Insurance Association, which was in full force and effect and covered the plaintiff herein, Pete Black, at the time of his injury, so that under the clear provision of Section 3 of Article 8306, Revised Statutes of Texas, 1925, said Pete Black has no right of action against this third party defendant, having received the benefits under the Workmen's Compensation Act of Texas to which he was entitled from said Texas Employers' Insurance Association, and to require this third party defendant to indemnify Sinclair would be making third party defendant liable to Pete Black indirectly and requiring it to do indirectly that which it cannot be directly required to do.

(b) The complaint filed herein by Pete Black against Sinclair does not seek to hold Sinclair liable for damages resulting from the operations of this third party defendant under his contract with Sinclair, but seeks to recover for damages proximately caused by the negligence of Sinclair. The provision in subparagraph (1) of paragraph 2 of the drilling contract that the contractor agrees "to hold Company harmless from any and all liability for damages to the person and or property of any and all persons resulting from the operations of contractor hereunder", is not sufficient to express in unequivocal terms an agreement for this third party defendant to indemnify Sinclair against Sinclair's own negligence. Said contract was primarily a drilling contract and not a surety contract, and this third [363] party defendant is not in the surety business, and said purported indemnity agreement should be strictly construed against

Sinclair against its own negligence, and the indemnity claimed is not expressed in unequivocal terms and neither the language nor the general tenor of the contract show that protection of Sinclair against its own negligence was intended.

WHEREFORE, PREMISES CONSIDERED, this third party defendant prays that third party plaintiff take nothing by its suit against him but that he be permitted to go hence without day with his costs.

LEACHMAN, GARDERE, AKIN & PORTER,
1600 Republic National Bank Bldg.,
Dallas 1, Texas,

By /s/ HENRY D. AKIN

Attorneys for Third Party Defendant Lee Brown d/b/a Lee Brown Drilling Company.

A true and correct copy of the above and foregoing original answer of third party defendant Lee Brown d/b/a Lee Brown Drilling Company to the third party action filed against him by Sinclair Oil & Gas Company has been served upon Sinclair Oil & Gas Company by mailing same to its attorneys, Stubbeman, McRae, Sealy & Laughlin, Petroleum Life Bldg., Midland, Texas, and Fulbright, Crooker, Freeman, Bates & Jaworski, Bank of the Southwest Bldg., Houston 2, Texas, its attorneys, this 4th day of September, 1957.

[371] (Caption Omitted)

(Filed in Clerk's Office October 8, 1959.)

MOTION FOR INSTRUCTED VERDICT OF THIRD PARTY DEFENDANT, LEE BROWN, d b a LEE BROWN DRILLING COMPANY

TO THE HONORABLE JUDGE OF SAID COURT:

Now comes Lee Brown, d b a Lee Brown Drilling Company, Third Party Defendant in the above entitled and numbered cause, hereinafter referred to as Contractor, at the close of the evidence and before the case has been submitted to the jury, and files this his motion for an instructed verdict in his favor insofar as the third party complaint filed against him by the defendant and third party plaintiff, Sinclair Oil & Gas Company, hereinafter referred to as Company, is concerned, for the following good and sufficient reasons and on the following grounds, to-wit:

1.

Said Company seeks to recover against said Contractor judgment for all sums, if any, which may be adjudged against said Company in favor of Plaintiff, Pete Black, only under the provisions of subsection (1) of section 2 of the drilling contract between said Company and said Contractor admitted in evidence herein. Said subsection provides that Contractor agrees "to hold Company harmless from any and all *liability* for damages to the person and or property of any and all persons resulting from the operations of said Contractor hereunder." Plaintiff's [372] pleadings and evidence herein clearly show that Plaintiff is not seeking to enforce and cannot base liability against said Company re-

sulting from any act or omission or the operations of said Contractor, but Plaintiff is seeking to enforce liability for damages against said Company proximately caused by said Company's own negligence and not any *liability* for damages resulting from the operations of said Contractor. It is therefore self-evident that said indemnity provision does not encompass the situation involved in this suit wherein Plaintiff seeks to recover against said Company for said Company's own negligence proximately causing Plaintiff's injuries, and is not seeking to enforce liability resulting from the operations of said Contractor.

2.

Said indemnity provision of the drilling contract is too broad and general, does not clearly and unequivocally bind said Contractor to indemnify said Company against liability for damages arising from said Company's own negligence or the Company's operations or acts or omissions, and the law is clearly settled by the United States Court of Appeals for the Fifth Circuit in such cases as *Batson-Cook Company v. Industrial Steel Erectors; 257 F. 2d 410; Halliburton Oil Well Cementing Co. v. Faulk, 180 F. 2d 79*, certiorari refused; *Standard Oil Company of Texas v. Wampler; 218 F. 2d 768*; and *Employers Casualty Company v. Howard P. Foley Co., Inc., 158 F. 2d 363*; that indemnity agreements are [373] strictly construed against him who claims to be an indemnitee and this is particularly true where the result would be to indemnify against one's own negligence, and it will not be so construed unless such obligation is expressed in clear and unequivocal terms.

3.

Said indemnity contract is too broad to indemnify said Company against its own negligence in that it is not limited to any "specified operation or instrumentality" as required by the Supreme Court of Texas in order for an indemnitee to be relieved of the consequences of his own negligence in such cases as *Mitchell's, Inc. v. Friedman*, 303 SW 2d 775 and *James Stewart & Co. v. Mobley*, 282 SW 280 (ref.).

4.

The uncontroverted evidence shows that said Contractor was engaged in the oil well drilling business and not in the business of entering into indemnity contracts as indemnitor for a premium, not being a surety or insurance company, and said indemnity provision in said drilling contract would not bind said Contractor to indemnify said Company for liability for damages resulting from said Company's own negligence in the absence of a clear and unequivocal agreement binding it to indemnify said Company for said Company's own negligence, that is, a direct statement that said Contractor would indemnify said Company against liability for damages resulting from said [374] Company's own negligence, or from some specific operation or instrumentality.

5.

The uncontroverted evidence shows that Plaintiff was an employee of said Contractor who carried Workmen's Compensation Insurance and that Plaintiff has received the benefits thereof, and Section 3 of Article 8306 of the Revised

Civil Statutes of Texas, 1925, clearly provides that an injured employee has no right to recover damages from his employer who is a subscriber under said Workmen's Compensation Act, and to permit said Company to be indemnified by said Contractor for damages recovered by said Contractor's employee against said Company would be indirectly permitting said employee to recover damages from his employer for which he had already received compensation benefits, and would thus enable plaintiff to do indirectly that which he could not do directly and which is expressly forbidden under the Texas law as announced in such cases as *West Texas Utilities v. Renner, (Tex. Com. App.) 53 SW 2d 551* and *Hill v. City of Galveston, 241 SW 2d 229, 232*, and as followed by the federal courts in this state, as shown by the case of *McCormick v. United States, 134 F. Supp. 243.*

6.

The uncontroverted evidence shows that Plaintiff is not entitled to recover from Sinclair since the danger arose from the natural course of the operation and a danger inherent in [375] the work, since his injuries were caused by transistory conditions incident to the progress of the work, and since Plaintiff voluntarily assumed the risk of remaining on and gauging the tank which he frankly admitted he knew was slick and dangerous, and defendant is entitled to an instructed verdict against Plaintiff, and said third party defendant herein and hereby refers to and adopts said defendant's motion for an instructed verdict against Plaintiff, and

makes same a part hereof for all purposes as if fully set out herein.

7.

If liability for damages to the person of plaintiff *did* result from the operations of Lee Brown, then Sinclair Oil & Gas Company would not be liable to plaintiff for damages resulting from Lee Brown's operations because Lee Brown was admittedly an independent contractor; and since Sinclair would not then be liable to Plaintiff it necessarily follows that Lee Brown would not be liable to indemnify Sinclair for a non-existent liability for damages. On the other hand, if liability for damages to the person of plaintiff *did not* result from the operations of Lee Brown, then Lee Brown would not be liable to Sinclair under the indemnity agreement by which Lee Brown agreed to indemnify Sinclair against liability for damages resulting from the operations of Lee Brown.

It thus appears self-evident that Lee Brown would not be [376] liable to Sinclair regardless of whether the liability for damages to the person of Plaintiff either did or did not result from the operations of Lee Brown, and that in either of such events, one or the other of which is *bound to be true*, Lee Brown is entitled to an instructed verdict and judgment in his favor as a matter of law.

Wherefore, premises considered, third party defendant, Lee Brown, d b a Lee Brown Drilling Company, prays the Court that the Court peremptorily instruct the jury to return its verdict in favor of this third party defendant and again-

said third party plaintiff, Sinclair Oil & Gas Company, or in the alternative that the Court render judgment that third party plaintiff take nothing by its third party complaint against this third party defendant.

Respectfully submitted,

LEACHMAN, GARDERE, AKIN & PORTER,

By /s/ HENRY D. AKIN

Attorneys for Third Party Defendant Lee Brown, d b a Lee Brown Drilling Company.

Duly and timely presented and by the Court
this day of October, 1959, to which action of the Court excepts.

Judge Presiding

[377] (Caption Omitted)

(Filed in Clerk's Office January 19, 1961.)

ORDER AS TO ORIGINAL EXHIBITS

It appearing to the Court that it is not practicable for Plaintiff's Exhibits Nos. 29 and 30 and Defendant's Exhibits Nos. 1, 7, 8, 9 and 10 to be copied into the record on appeal in the captioned caused, and that said exhibits were introduced in the trial of said cause and are referred to in the Transcript of Evidence pertaining thereto:

It is, therefore, ORDERED that said exhibits referred to above be sent forward in their original form to the U. S. Court of Appeals for the Fifth Circuit in New Orleans, Louisiana, at the same time and by the same means as the Record on Appeal in said captioned cause.

DATED this 19 day of January, 1961.

/s/ R. E. THOMASON

United States District Judge

[378] (Caption Omitted)

(Filed in Clerk's Office December 6, 1960.)

ORDER EXTENDING TIME TO DOCKET RECORD

It appearing to the Court that the preparation of the record on appeal in this cause has been delayed because of pressing official business in the office of the Court Reporter; that Notice of Appeal was filed by the plaintiff herein on November 8, 1960; that the period of forty days from the filing of Such Notice of Appeal has not yet expired; and that the time for filing the record on appeal and docketing same should be extended:

It is, therefore, ORDERED that the time for filing the record on appeal and docketing the appeal in this action is hereby extended to and including the 6th day of February, 1961.

DATED this 6 day of December, 1960.

/s/ R. E. THOMASON
United States District Judge

Entered in Minutes
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